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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 19 1993

In the Matter of)
)
Amendment of the Commission's)
Policies and Rules Pertaining)
to the Regulation of Cellular .)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RM 8179

SUMMARY

The decision in AT&T v. FCC establishes that Section 203 of the Communications Act requires common carriers to tariff their interstate services. There currently are no Commission rules that expressly define how this requirement applies to cellular licensees, who are "dominant" common carriers that provide, in part, interstate services. Therefore, NCRA supports CTIA's request that the Commission adopt such rules.

Contrary to CTIA's claims, however, cellular licensees cannot be excused from the Section 203 tariffing requirement merely

because that has been the Commission's practice in the past.

material requirements imposed on large and small licensees,
respectively.

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~~—Recent Reorganizations By Federal~~

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COMMENTS OF
THE NATIONAL CELLULAR RESELLERS ASSOCIATION

INTRODUCTION

The National Cellular Resellers Association ("NCRA") ^{1/} hereby submits these comments on the Cellular Telecommunications Industry Association's ("CTIA") petition in the above-captioned rulemaking proceeding ("Petition"). ^{2/} NCRA supports CTIA's request that the Commission adopt policies and rules to govern the tariffing of interstate services provided by cellular licensees. NCRA differs with CTIA on many other issues raised in the Petition, as discussed below.

^{1/} NCRA is the principal nationwide association of non-facilities based cellular service providers. Its primary goal is to promote competition in cellular markets, and to thereby provide the benefits of competition to consumers.

^{2/} See CTIA Petition For Declaratory Rulemaking And Rulemaking, filed January 29, 1993. Although styled as a request for both declaratory ruling and rulemaking, the Commission has informed the public that the Petition will be treated as a petition for rulemaking. See FCC PUBLIC NOTICE, Petitions For Rulemaking Filed, Rpt. No. 1927, February 17, 1993. NCRA relied on this decision in fashioning these Comments.

SUMMARY

The decision in AT&T v. FCC establishes that Section 203 of the Communications Act requires common carriers to tariff their interstate services. There currently are no Commission rules that expressly define how this requirement applies to cellular licensees, who are "dominant" common carriers that provide, in part, interstate services. Therefore, NCRA supports CTIA's request that the Commission adopt such rules.

Contrary to CTIA's claims, however, cellular licensees cannot be excused from the Section 203 tariffing requirement merely because that has been the Commission's practice in the past, nor can licensees circumvent such requirement by invoking Sections 152(b) or 221(b) of the Act. The requirement is a statutory one and, therefore, cannot be eliminated by agency policy or rule. Cellular licensees do not fall under Sections 152(b) and 221(b).

Licensees are dominant carriers by any reasonable measure, and their federal tariffing requirements should be fashioned accordingly. Licensees should be required to tariff all rates (not just minimum/maximum rates) for all of the interstate services they provide. These include the services identified in CTIA's Petition: resale, roaming and access. "Access" service includes cellular airtime charges imposed on interstate calls.

Like all other dominant carriers, all licensees must be required to file tariff support material demonstrating that their rates are just, reasonable and nondiscriminatory. In keeping with long-standing practice in the landline market, however, the Commission may find it appropriate to differentiate the support

material requirements imposed on large and small licensees

also claims that the Commission may (and should) exempt licensees from Section 203. These claims are without merit.

A. Cellular Licensees Provide Interstate Service Through Means Other Than Resale

Since Communications Act tariffing obligations attach only to interstate services, the threshold question of what cellular services are jurisdictionally interstate must be resolved before any meaningful decisions can be made about how such services must be tariffed. Proceeding otherwise puts the cart before the horse, and will leave licensees and resellers ^{7/} with no clear understanding of their tariffing obligations.

CTIA provides little help in resolving this threshold question. The Petition does not attempt to define "interstate" or "intrastate" service. Moreover, CTIA references only two services that it suggests may be jurisdictionally interstate: "interstate resale and access." See Petition at n.4 & n.15.

The Commission has previously determined that reselling an interstate service does not change its jurisdictional nature. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980). The Commission also has determined that services and facilities used to initiate or terminate an

^{7/} Under the Commission's rules and policies, resellers are "non-dominant" common carriers. To the extent resellers provide interstate telecommunications services, such services would be federally tariffed in accordance with whatever rules the Commission ultimately adopts in its on-going rulemaking concerning non-dominant carrier filing procedures. See Tariff Filing Requirements for Non-dominant Common Carriers, FCC 93-103, CC Docket No. 93-36, released February 19, 1993.

interstate telephone call -- i.e., "access" services and facilities -- are jurisdictionally interstate. See MTS/WATS Market Structure, Third Report and Order, 92 FCC 2d 241 (1983). Thus, licensees are providing an interstate service when they provide access to the interstate telecommunications network and when they resell interstate services.

Other than "interstate resale and access," the only other services mentioned in CTIA's Petition are "roaming" services and the airtime charges licensees impose when an end-user makes an interstate call. According to CTIA, the roaming services are jurisdictionally intrastate, and airtime charges are (inexplicably) neither interstate nor intrastate. See id. at 7, 14-15. These claims reflect an inaccurate reading of the law.

The Communications Act defines "interstate communication" to include, inter alia, communication or transmission from any state to any state. See 47 U.S.C. 153(e). In this regard, every court that has considered the issue has held that telecommunications services and facilities used in connection with even a single interstate communication are jurisdictionally interstate to the extent of their use. See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968); National Ass'n of Regulatory Util. Com'rs. v. FCC, 746 F.2d 1492, 1498-1500 (D.C. Cir. 1984); Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 214-18 (D.C. Cir. 1982); New York Telephone Co. v. FCC, 631 F.2d 1059, 1065-66 (2nd Cir. 1980); California v. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977). Communications services and facilities may be provided wholly within a state and still be

considered jurisdictionally interstate, particularly when they are provided by carriers operating pursuant to radio licenses granted under Title III of the Act. See U.S. v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968); General Telephone Co. of Cal. v. FCC, 413 F.2d 390, 397-401 (D.C. Cir.), cert. denied 90 S.Ct. 173, 178 (1969).

Under this precedent, at a bare minimum, the airtime charges for those calls which originate in one state and terminate in another are jurisdictionally interstate. By CTIA's own admission, such charges are "associated with interstate calls." End-users incur these charges for the use of interstate facilities when making an interstate call. CTIA's claim that such charges are "independent" of the call, and are neither interstate nor intrastate charges, is simply incorrect.

In fact, the "airtime" that licensees provide to end-users making interstate calls is a component of interstate access. The services and facilities underlying that airtime, and the airtime itself, fall squarely within the definitions of "Access Service" and "Access Minutes of Use" contained in the Commission's Rules. See 47 C.F.R. 69(2)(a)-(b). As the Commission has recognized, the fact that a service may be billed to an end-user directly has no jurisdictional significance and does not take that service from the definition of "access service." See Petitions For Waiver of Various Sections of Part 69 of the Commission's Rules, 2 FCC Rcd 28, 32 & 34; NYNEX Telephone Companies' Petitions For Waiver of Various Sections of the Commission's Rules, 2 FCC Rcd 61, 67-68 (1987).

"Roaming" charges imposed on calls made from one state to another also are jurisdictionally interstate under applicable precedent. ^{8/} As the Commission has noted:

(S)ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. Interconnection Order, 59 RR 2d (P&F) 1275 , 1284-85 (1986).

CTIA offers no credible basis for reversing this analysis.

CTIA suggests that roaming services need not be federally tariffed because they typically are provisioned in accordance with inter-carrier agreements not subject to tariffing Sierra-Mobile doctrine. See Petition at 14. This argument is makeweight. No one has claimed that intercarrier agreements are subject to Section 203. The issue is whether a roaming service provided to an end-user must be tariffed.

Moreover, roaming services as they currently are provisioned are not billing and collection services, as CTIA claims. See id. If anything, roaming services are more closely akin to operator services utilized with a calling card because, in each instance, a charge is imposed on an end-user for a service that enables that end-user to make a call while away from home. Such interstate operator services are communications services subject to tariffing

^{8/} Indeed, all "roaming" charges incurred by a cellular end-user in any state other than his or her home state are arguably interstate charges. This is so because the essential nature of the service being provided is to permit a cellular call to be made by an end-user from State A (his or her home state) while he or she is in State B.

requirements, not billing and collection services. See, e.g., AT&T TARIFF FCC No. 1, at § 3.2 (Operator Station, Billed to Calling Card). By the same rationale, so are cellular roaming charges.

B. Statutory Tariffing Requirements
Cannot Be Eliminated Due To Past
Agency Practices

CTIA is simply wrong in asserting that, despite the holding of AT&T v. FCC, the Commission may excuse licensees from tariffing obligations in the future because they have never been subject to such obligations in the past. See Petition at 3-4. As the opinion in that case makes clear, federal tariffing is a statutory requirement that cannot be eliminated by agency policy or rule.^{9/} Thus, the Commission's past policies offer no basis for excusing licensees from complying with Section 203.

II. NEITHER SECTION 152(b) NOR SECTION 221(b) PROVIDES
LICENSEES A JURISDICTIONAL "ESCAPE HATCH" TO AVOID
INTERSTATE TARIFFING REQUIREMENTS

A. Section 221(b) Applies To Cellular
Operations Only In A Limited
Manner, If At All

CTIA contends that Section 221(b) of the Act reserves to the states jurisdiction over "charges for essentially intrastate services which may also have an incidental interstate component." Petition at 4. From this contention, CTIA goes on to argue that Section 221(b) exempts nearly all of a cellular licensee's services from the tariffing requirements of Section 203. Id. at

^{9/} See AT&T v. FCC, 978 F.2d at 736.

5-8. In fact, Section 221(b) is far too thin a thread to carry all the jurisdictional weight that CTIA ascribes to it. ^{10/}

Section 221(b) was designed to preserve state jurisdiction over communications that occur within a single telephone exchange established by state regulators that happens to overlap state lines. See Computer & Communications Industry Association v. FCC, 693 F.2d 198, 216-17 (D.C. Cir. 1982). In other words, Section 221(b) merely prevents the FCC from asserting jurisdiction over wholly intrastate communications that occur in those relatively few and unusual situations in which one telephone exchange straddles the borders of two or more states, such as in Washington, D.C. and Cincinnati, Ohio.

Equally important for present purposes, Section 221(b) in no way limits the FCC's jurisdiction over interstate communications, and the FCC has so held. See Petition of the Continental Telephone Company of Virginia, 2 FCC Rcd 5982, 5984 & n.32

^{10/} CTIA's characterization of interstate traffic as incidental is far fetched. Cellular carriers advertise and promote the ability of subscribers to call anywhere in the country and receive calls from anywhere in the country. Cellular carriers have invested millions of dollars to create nationwide seamless roaming services. Where not prohibited by law, they have also entered into significant alignments with long distance carriers. In fact, in the future it is expected that "a large portion of the long distance traffic is expected to be tied to wireless telephones. Donaldson, Lufkin & Jenrette, at 25. By its acquisition of McCaw, AT&T is thought to be buying access to an increasing stream of long distance business. Donaldson, Lufkin & Jenrette, The Cellular Communications Industry, Winter 1992-93, ("DLJ") at 27. There is nothing to suggest that the interstate portion of this traffic is now or will be incidental. One would expect, in fact, the percentage of interstate calls to approximately mirror the percentage of interstate calls placed from wireline phones.

(1987). U.S. Courts of Appeal have examined this issue on five separate occasions, and always have reached the same conclusion as the FCC. See National Ass'n of Reg. Util. Com'rs v. FCC, 746 F.2d 1492, 1500 (D.C. Cir. 1984); New York Telephone Co. v. FCC, 631 F.2d 1059, 1064-65 (2nd Cir. 1980); North Carolina Utilities Commission v. FCC, 552 F.2d 1036, 1045 (4th Cir. 1977), cert. denied 434 U.S. 874 (1977); Puerto Rico Telephone Co. v. FCC, 553 F.2d 694, 698-99 (1st Cir. 1977); North Carolina Utilities Commission v. FCC, 537 F.2d 787, 795 (4th Cir.), cert. denied, 429 U.S. 1027 (1976).

B. Licensees Are Not "Connecting Carriers"

The Commission must reject out of hand CTIA's claim that "many" licensees are Section 152(b) "connecting carriers" and, as such, are not required to file federal tariffs. This claim is at odds with the plain language of Section 152(b), its legislative history, as well as with Commission and judicial interpretations of that provision.

As the Commission and the courts have reiterated time and again, the legislative history of Section 2(b)(2) clearly states its purpose was to exempt small independent telephone companies from certain aspects of the Commission's jurisdiction. Companies to which the 2(b)(2) exemption was intended to exempt were, e.g., those small, independent telephone companies that "are entirely local affairs often owned and operated by a family." See

to Bell Operating Companies, (1985); FCC Red 1750 (1987) (BOC Order I). ^{11/}

Despite CTIA's assertion of comparability between these small mom and pop independent telephone companies and cellular carriers, the analogy does not hold. NCRA estimates that the top 10 cellular carriers each have annual revenues in excess of \$100,000,000. See Appendix A. McCaw, the largest of the cellular carriers, appears to have revenues in excess of 1.5 billion dollars. Id. Rather than mom and pop type operations, today more than ever, cellular carriers are merely telephone companies in another guise. According to Donaldson, Lufkin and Jenrette, "now that the dust has settled, telephone companies own or control about 77% of all pops, with the remainder held largely by a few cable companies like Comcast in Philadelphia ...". (DLJ at 24). These carriers certainly cannot be equated to the small mom and pop type carriers the legislature intended to exempt from regulation.

The Commission's own tariffing rules help make this point. Under these rules, dominant carriers whose gross annual revenues exceed or are estimated to exceed \$500,000 for the most recent 12 month period, or a representative 12 month period, are subject to Section 61.38 of the Commission's Rules. 47 C.F.R. § 61.38. Section 61.38 in turn requires the performance of costs of service

^{11/} In this regard, CTIA's Petition is devoid of facts on which the Commission could find for CTIA. The burden is on each carrier to establish the factual predicate for any claim that [its] operations fit all of the requirements for a Section 2(b)(2) exemption. Id.

mean "only," so a carrier that engages in even a single interstate communication through any other means is not a connecting carrier. BOC Order I at 1753; 2 FCC Rcd 1750, 1753 (1987). Thus, the Commission has held that "any carrier owning, maintaining, or operating a toll line that crosses a state boundary cannot be a connecting carrier [.]" Id. Under this precedent, connecting carrier status is not available to any licensee that provides service in an MSA or RSA whose borders straddle state lines. As CTIA admits, "many" MSAs and RSAs are constituted in this manner. See Petition at 8.

The Commission also had determined that to the extent a carrier interconnects with an affiliated entity, and any interstate traffic is carried via that interconnection, the licensee cannot be a "connecting carrier." See BOC 152(b)(2) Order I, 2 FCC Rcd at 1753. Accordingly, connecting carrier status would appear to be precluded to licensees that route interstate traffic through a landline local exchange carrier (LEC") or interexchange carrier ("IXC") affiliate. It is NCRA's understanding that most, if not all, wireline licensees route interstate traffic through their landline LEC affiliates, and that numerous licensees route traffic through affiliated IXCs (e.g., Contel through Sprint). Under directly relevant precedent, none of these licensees is a connecting carrier.

The Commission also has held that connecting carrier status appears to be unavailable to licensees that are commonly held in some form of holding company corporate structure. Under this "indirect connection" holding, for example, connecting carrier

status is denied to carriers involved in a communication that originates in one carrier's service area (e.g., Florida) and terminates in the service area of an affiliated carrier operating in another state (e.g., Georgia), regardless of the manner in which the call is transported between those service areas.

Application of Section 2(b)(2), CC Docket No. 85-197, 58 RCC 2d 830, 832 (1985). It is NCRA's understanding that the vast majority of cellular service is provided by licensees that are part of holding company structures. Under well established precedent, these licensees are not connecting carriers.

CTIA contends that the Commission should not apply the "indirect connection" theory to licensees because doing so is

Justice, NTIA, the GAO, and the staff of the Federal Trade Commission all have concluded within the past two years that the cellular market is not competitive, and that the duopoly cellular market structure gives licensees substantial market power. See infra at fns 25-27. Therefore, the Commission should reject CTIA's request and reaffirm licensees' status as "dominant" carriers.

The cellular market structure established by the Commission during the early 1980s consists of two licensed, facilities-based carriers and the possibility of resale. Under this structure, there is an absolute barrier to facilities-based entry by competing service providers. In adopting this structure, the Commission acknowledged that it provided only a "marginal amount" of facilities-based service competition.^{12/} Nothing has occurred since then to indicate that competition is anything other than marginal.

The noncompetitive nature of the cellular industry's "two carriers per market" structure has been exacerbated due to substantial merger and acquisition activity. This activity has resulted in increasingly concentrated ownership of cellular licenses. See infra at 21. Today, a shrinking number of facilities-based providers face each other in markets around the country. The Commission has noted in other contexts that market conditions like these are a recipe for anticompetitive conduct; in

^{12/} Cellular Communications Systems, 86 FCC 2d 469, 478 (1981).

particular, price collusion. ^{13/} The economic literature also supports this conclusion. ^{14/} Indeed, if the Commission applied the same competitive analysis to cellular as it applied in the interexchange regulation proceeding, the cellular market could not be found competitive. ^{15/}

A study reported in a June 6, 1990 California Public Utilities Commission order relating to cellular service in that state estimated that facilities-based carriers there realized annual returns on investment ranging from 25.3 percent to 123.1 percent. ^{16/} Current operating margins are also extremely high. For example, DLJ estimates that McCaw, Pactel, TDS, and Comcast have operating margins in excess of 40%. See DLJ at Table 3.

^{13/} See IX Market Regulation Order, 5 FCC Rcd at 2639-40.

^{14/} See, e.g., Hay, "Oligopoly, Shared Monopoly, and the Anti-trust Law," 67 Cornell L. Rev. 439, 443-57 (1982); Scherer & Ross, Industrial Market Structure and Economic Performance, at 235-316 (3rd. ed. 1990).

^{15/} In that proceeding, the Commission identifies many factors that can be used to evaluate whether a market is competitive, and then it evaluates the interexchange market in accordance with those factors. The cellular market is characterized by many of the factors the Commission has concluded tend to facilitate price collusion in a market, including: (1) a small number of equally sized providers; (2) product homogeneity; and (3) a large number of small service orders. IX Market Regulation Order, 5 FCC Rcd at 2639-40, 2656 n.148. NCRA expects that the Commission will use the same standards to evaluate competitive conditions in the cellular and interexchange markets. Absent a reasonable explanation, the application of different standards is arbitrary and capricious.

^{16/} See Investigation on the Commission's Own Motion Into the Regulation of Cellular Radiotelephone Utilities, Decision No. 90-06-25 (Jun. 6, 1990) (statement of Commissioner Duda).

Returns of this magnitude are wholly outside the range of returns normally associated with workably competitive markets.

AT&T also has analyzed the issue of competitive conditions in cellular markets, and it reached the same conclusion as NCRA. In a submission to the U.S. Department of Justice in opposition to the RBOCs' request to remove cellular radio service from Section II of the MFJ, AT&T noted that "cellular radio is a 'market that is simultaneously free of competition and regulation' and that functions as a 'monopoly with two operators.'" ^{17/} In that submission, AT&T also: (1) noted that "cellular 'air time' is priced at levels that are so high that cellular firms will 'discount' or 'give away' CPE and 'ancillary' services in order to sell more 'air time[;]'" (2) demonstrated that such a phenomenon could only exist "if there were actual or tacit collusion in this 'duopoly' that allowed air time to be priced at levels that afford supracompetitive margins[;]" and (3) concluded that "the present record simply will not support a claim that cellular exchange services are a 'competitive' market today." ^{18/}

^{17/} See "AT&T's Opposition to RBOCs' Motion To 'Exempt' Wireless Services From Section II Of The Decree," submitted to Department of Justice in United States of America v. Western Electric Company, Civ. Action No. 82-0192 (D.D.C.) on April 27, 1992, at 37.

^{18/} Id. at 38-39. MCI also submitted comments to the DOJ demonstrating that the cellular service industry is not characterized by workable competition. See "MCI's Opposition to the BOCs' Motion to Eliminate the Interexchange and Equal Access Restrictions for all Current and Future 'Wireless Technologies'," submitted to Department of Justice in United States of America v. Western Electric Company, Civ. Action No. 82-0192 (D.D.C.), May 4, 1992, at 6.

The Commission itself concluded just last year that there is not sufficient evidence to conclude that cellular markets are competitive. See Bundling of Cellular Customer Equipment and Cellular Service, 7 FCC Rcd 4028, 4029 (1992). Moreover, the Commission also concluded that existing mobile radio services other than cellular do not "constrain facilities-based cellular carriers from acting anticompetitively." Id.

The Commission need look no further than its own files for additional data and analysis confirming the significant market power of facilities-based carriers and the lack of price competition in the cellular marketplace. In the Commission's general docket inquiry into personal communications services, for example, one commenter, PCN America, submitted a comprehensive analysis of the cellular industry's market structure and service prices during 1985-88. That analysis, which was performed by Economic and Management Consultants International, concluded in part that "(c)ellular service pricing structure closely resembles the characteristics predicted by classical duopoly theory: little direct price competition; no significant decline in prices; and heavy reliance on price discrimination strategies." 19/

Nothing has changed since then. Despite CTIA's claims that cellular rates have fallen, for example, the investment community contradicts that assertion, concluding instead that rates are

19/ Economic and Management Consultants International, "Impact of PCN on Pricing and Competition in the Cellular Industry." (1990), at 9 (EMCI Study). The study was filed as an Exhibit to PCN America's filing in the docket. See Comments of PCN America, Gen. Docket No. 90-314, Exhibit 4, filed Oct. 1, 1990.

likely rising. For example, according to Donaldson, Lufkin and Jenrette, "many operators have eliminated low-priced minimum packages in favor of higher packages with bundled minutes, so retail rates are, if anything, likely rising, not falling. See DLJ at 10. The clear absence of declining rates, and the probability even according to investment analysts that rates are rising is classic evidence of the lack of competition.

2. Cellular Carriers Have Substantial Market Power.

Market power, or the ability profitably to set prices substantially above cost, is the sine qua non of "dominance" under the Communications Act. In order for the Commission to accede to CTIA's request and reclassify licensees as nondominant, the Commission must find that cellular carriers lack market power. ^{20/} On the other hand, if the Commission found that licensees had market power, it must retain licensees' current dominant classification and, in so doing, reject CTIA's request.

i. Market Concentration: In conjunction with other factors, such as barriers to entry, the degree of market concentration is an indication of market power by participating firms. Highly concentrated markets tend to create market power, while markets with many competing firms tend to diffuse market power.

^{20/} The relevant service (product) market is facilities-based cellular service and all good substitutes, should any exist. (Possible substitute services consist of landline telephone service, paging services, and specialized mobile radio.) The Commission concluded just last year, however, that while these services may be complementary to cellular, they are not current substitutes.